

No. 224.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILROAD CO.,
Plaintiff in Error,
VS.
FRANK PAUSON,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

GEORGE LEZINSKY,
Attorney for Defendant in Error.

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FILED
JUN 13 1895

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NORTHERN PACIFIC RAILROAD
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vs.

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BRIEF FOR DEFENDANT IN ERROR.

This action is for damages for the wrongful expulsion of the defendant in error from a train of plaintiff in error, while a passenger on such train, and as such is, as now recognized by the authorities an action based *both* upon a breach of contract and tort. * * *

The facts as stated by the plaintiff in error are distorted and unfair, which necessitates a brief statement of the case by us.

The facts of the case are these: The defendant in error had purchased of the plaintiff in error a round-trip ticket from Portland to Seattle and return; had made the trip from Portland to Seattle and was a passenger on a train of the plaintiff in error, making the return passage from Seattle to Portland, at the time of his expulsion from the train. By the terms of the contract, which was a part of this ticket, it was required of the defendant in error that "the holder must be *identified* as the original purchaser of this ticket BY WRITING HIS OR HER SIGNATURE ON THE BACK THEREOF, or by other means, if necessary,

in the presence of the ticket agent of the Northern Pacific Railroad at Seattle, Wash., who will witness the same, otherwise it will not be honored for passage," and the defendant in error testified that he had complied with this condition, and is corroborated by two witnesses. The facts as found by the jury, under the instruction of the Court, being, "the plaintiff (defendant in error) did present himself to an agent and sign the ticket in his (the agent's) presence, and the agent took the ticket and returned it, in such a way and under such circumstances as to justify plaintiff in believing that he, the agent, had witnessed and stamped the ticket, and plaintiff so believing, entered the train * * * and explained to the conductor the circumstances." (Trans., p. 133.)

The defendant in error had also purchased a Pullman car ticket for a berth, which is only sold to persons having proper railroad transportation, and had surrendered the ticket and was given a check in lieu thereof on being shown to his berth. At the time the conductor came for the ticket of the defendant in error he had undressed and retired to his berth.

The evidence further shows that the expulsion took place at night, and that defendant in error was compelled to get up and dress, and was led out of the cars, and suffered much humiliation and mental suffering. It is true that no bodily harm was inflicted upon the defendant in error, but that he did suffer much that the law recognizes as a damage for which he is entitled to compensation is clearly shown by the evidence.

Counsel for the defendant in error is very much embarrassed in presenting this case to the Court on account of

the very peculiar and improper manner in which the counsel for the defendant conducts his case and proceedings. In the first place the ticket in question and all other documents in the case are not contained in the record and counsel for plaintiff in error seems to consider himself at liberty, at any time, to interject into the record whatever he desires. The most glaring instance of this practice on his part is contained in what he calls his IV specification of error. The record (page 72) shows that this motion was made without any grounds being specified, and there is no practice which entitles the counsel for the first time to state the grounds of his motion when he framed his assignments of error. This practice is also noticeable in the VI assignment of error, as will be seen by a reference to page 137 of the record. Much of the matter contained in his brief is on a par with the unwarranted and vicious remarks contained on the last page of counsel's brief, which certainly comes in bad taste from the sponsor and representative of a case founded on willful perjury, which was the finding which the jury must have come to as to the main evidence offered by the plaintiff in error under the pointed and plain instructions of the Court.

The only specification of error worthy of consideration and properly before the Court is No. VII (page 148), which involves the controlling portion of the charge of the Court. This presents, however, the entire merits of the case, and we are satisfied to submit the case for the defendant in error upon showing the correctness of this instruction.

The authorities cited by the plaintiff in error are none

of such a character as to be taken as the law of this case, and beyond any question the latest and clearest case in point is the case of

N. Y., etc., Railroad vs. Winter, 143 U. S., 60.

The charge of the Court in this case is in its main element very similar to the charge of the Court in the case at bar, and the controlling portion of the decision in the case is as follows (p. 71, l. 2:

“The gravamen of this action is the wrongful conduct of the conductor who ejected the plaintiff from the train.”

“The reason of such rule is to be found in the principle that where a party does all that he is required to do under the terms of a contract into which he has entered, and is only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party for such breach of contract.”

As to the ticket in this case we claim that the notice attached to the ticket is a mere circular or notice attached to the ticket and is no part of the contract of carriage made by the defendant in error, and in any case the evidence shows that the defendant in error did to the letter perform every duty required of him by the contract to entitle him to passage, the only failure to perform any duty was on the part of the plaintiff in error itself, and there is certainly no law anywhere which establishes as a legal principle that where one of the parties to a contract has performed all of the conditions of the contract on his part to be performed and the other party either through negligence or design has failed to perform

the acts required of him, then the party wholly in fault can by reason of this fault on his part relieve himself of his obligation to the other party. It is conclusively held by the U. S. Supreme Court in the case cited that such a contention will not be upheld.

The safety and comfort of passengers upon railroad trains must demand that if through a fault solely on the part of the railroad company the ticket which the passenger presents is defective in some particular, when this fault is apparently that of the company itself and is reasonably explained, it must be accepted and the holder treated as a legal passenger in every particular.

To establish any other rule would be obviously unjust as otherwise a passenger *in no way to blame* and unknowingly furnished by the company with improper evidence of his right to passage, and, perhaps, without the means to engage other passage, might suffer very great damage and be without any adequate remedy.

In addition to the case cited the following authorities sustain the judgment in this case:

Wood on Railroads (Ed. 1892), Vol. 3, p. 1645.

Beach's Law of Railways, Vol. 2, p. 1111.

Willson vs. N. P. R. R. Co., 5 Wash., 621.

Murdock vs. Boston and A. Ry. Co., 137 Mass., 293.

Pennsylvania R. R. Co. vs. Bray, 25 N. E. Rep.,
439.

Chicago and E. R. R. Co. vs. Conley, 32 N. E.
Rep., 96.

Lake Erie and W. R. Co. vs. Fix, 88 Ind., 381.

Baltimore and O. R. Co. vs. Bambrey, 16 Alt. Rep.,

67.

Pittsburgh etc RR Co v Hennigh 39 Ind

Head vs. Georgia Pac. Ry. Co., 7 N. E. Rep., 217.

St. Louis, A. and T. Ry. Co. vs. Mackie, 9 S. W.
Rep., 451.

Missouri Pac. Ry. Co. vs. Martino, 18 S. W. Rep.,
1069.

It is respectfully submitted that the judgment should
be affirmed.

GEORGE LEZINSKY,
Attorney for Defendant in Error.